

REMARKS

Please note that in the previous two amendments (A and B), the claims submitted in the listing of claims were inadvertently taken from the original application, and did not reflect the claims as amended in the Preliminary Amendment filed on 9/19/2001. The listing of claims now correctly reflects the changes made in the Preliminary Amendment (which were merely to remove multiple dependencies). The Applicant apologizes for any confusion this may have caused.

This communication is responsive to the Office Action mailed October 4, 2005. Applicant respectfully requests the Examiner to enter the above-submitted amendments, and to consider the below-submitted remarks. In particular, Applicant respectfully submits that, on its face, the newly-cited Covington published patent application is not prior art to the present application.

In particular, while the Examiner does not explicitly state it, it appears that the Covington published application is being used in the §103 obviousness rejection as a §102(e) prior art reference. However, the present application has a filing date of September 19, 2001. The Covington published application has a filing date, on its face, of December 19, 2001. Therefore, the Examiner has not made a *prima facie* case that the Covington published application is §102(e) prior art.

In order for the Covington published patent application to be §102(e) prior art to the present application, the Examiner must establish that the material relied upon in making the rejection is entitled to a filing date earlier than the filing date of the present application. That is, according to MPEP 706.02(f)(1) [emphasis added]:

The 35 U.S.C. 102(e) date of a reference that did not result from, nor claimed the benefit of, an international application is its earliest effective U.S. filing date, taking into consideration any proper benefit claims to prior U.S. applications under 35 U.S.C. 119(e) or 120 if the prior application(s) properly supports the subject matter used to make the rejection in compliance with 35 U.S.C. 112, first paragraph.

Particularly where, as here, the published patent application being relied upon by the Examiner is a CIP application, it is incumbent on the Examiner to show that the Covington published application is entitled to a filing date that predates the filing date of the present patent application. That is, the Examiner must show that the prior application (i.e., prior to the Covington published patent application no. 10/026,247) whose filing date is being relied upon to make the 102(e)/103 rejection "properly supports the subject matter used to make the rejection in compliance with 35 U.S.C. 112, first paragraph." The Covington published application no. 10/026,247 is not *prima facie* entitled to the earlier filing date.

For this reason, the Examiner has not made a proper *prima facie* case of obviousness and, therefore, it is respectfully submitted that the rejection is improper.

CONCLUSION

Applicant respectfully requests a Notice of Allowance for this application from the Examiner. Should the Examiner believe that a telephone conference would expedite the prosecution of this application, the undersigned can be reached at the telephone number set out below.

Respectfully submitted,
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